HIGH COURT OF UTTARAKHAND AT NAINITAL
(Court's Order whether the case is or not approved for reporting)

Description of the case
Review Application No. 796/07
In

S. A.389/01
Old No. 1056 of 2000

Ramesh Chander Shah

Vs.

Prabhunath Prasad

Approved for reporting

~~**Not Approved for reporting**~~

Date of Decision: 05.12.07

Initial of Judge:

HIGH COURT OF UTTARAKHAND AT NAINITAL

Review Application No. 796 of 2007

IN

Second Appeal No. 389 of 2001

1. Ramesh Chandra Shah s/o Bishambhar Shah
2. Sri Suresh Chandra Shah s/o Sri Bishambhar Shar
   Both residents of village Amarapuri, Tehsil Dodapur,
   District Udham Singh Nagar

.....Defendants/ Appellant

Versus

Prabhunath Prasad S/o Sri Ram Charit Ram r/o village Amarpur, Tehsil Gadarpur, District Udham Singh Nagar

..... Plaintiff/Respondent

Sri M.C. Kandpal, Sr. Advocate assisted by Sri S.S. Chaudhari for the review-applicant.
Sri S.S. Yadav, Advocate for respondent.

Dated: December 5, 2007

Hon'ble Rajesh Tandon, J.

Heard Sri M.C. Kandpal, Sr. Advocate assisted by Sri S.S. Chaudhari counsel for the review applicant and Sri S.S. Yadav counsel for the respondent.

Present review application has been filed by the appellant against the judgment and order dated 25.05.2007 on the grounds that the first appellate court and the High Court have passed the judgment and order ignoring the plaint and the map annexed with the plaint. In agreement dated 25.2.1980 way has been shown. The Commissioner's report and map is not in accordance with the plaint and Commissioner's report is not liable to be accepted. The courts have not considered the

evidence adduced by the parties. There is inconsistency in the suit for mandatory injunction and partition of the property.

So far as, the merit of the review petition is concerned, the review petition can be filed only for consideration of important matters or evidence which, by mistake or error on the face of the record cold not be considered when the order was passed. A review petition cannot be filed for re-hearing of the entire matter by changing the counsel as well.

The Hon'ble Apex Court in the case **M/S Northern India Cateres (India) Ltd. v. Lt. Governor of Delhi, (1978) 4 SCC 36** has observed as under:

> *"It is well-settled that a party is not entitled to seek review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principal is that a judgment pronounced by the Court is final, and departure from that principal is justified only when circumstances of a substantial and compelling character made it necessary to do so: Sajjan Singh v. State of Rajasthan. For instances, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment: G.L. Gupta v. D.N. Mehta15. The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: O.N. Mohindroo v. Distt. Judge, Delhi. Power to review its judgments has been conferred on the Supreme Court by Article 137 of*

the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Article 145. In a civil proceeding, an application for review is entertained only on a ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure, and in a criminal proceeding on the ground of an error apparent on the face of the record (Order 40 Rule 1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility": Sow Chandra Kante v. Sheikh Habib_(1975) 3 SCR 935.".

In the case **Parison Devi v. Sumitri Devi, (1997) 8 SCC 715** Hon'ble Supreme Court has held that while exercising power under Order XL VII Rule 1 of the Code of Civil Procedure it is not permissible for erroneous decision to be re-heard and corrected and the power of review cannot be exercised to be an appeal in disguise. Hon'ble Supreme has observed as under:

It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P. (SCR at p. 186) this court opined:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'). The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error".

Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must

be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

In the case of **Union of India v. Paul Manicram AIR 2003 SC 4622** the preposition of law discussed as above has been consistently upheld by the Apex Court.

> *"As noted supra for the first time in the review application it was disclosed that the representation was made to the President of India and no representation was made to the State of Tamil Nadu or the Union of India who were arrayed in the writ petition as parties. This appears to be a deliberate attempt to create confusion and reap an undeserved benefit by adopting such dubious device. The High Court also transgressed its jurisdiction in entertaining the review petition with an entirely new substratum of issues. Considering the limited scope for review, the High Court ought not to have taken into account factual aspects which were not disclosed or were concealed in the writ petition. While dealing with a habeas corpus application undue importance is not to be attached to technicalities, but at the same time where the court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings the court has to take serious note of unclean approach. Whenever a representation is made to the President and the Governor instead of the indicated authorities, it is but natural that the representation should indicate*

as to why the representation was made to the President or the Governor and not the indicated authorities. It should also be clearly indicated as to whom the representation has been made specifically, and not in the manner done in the case at hand. The President as well as the Governor, no doubt are constitutional Heads of the respective Governments but the day-to-day administration at respective levels is carried on by the Heads of the Departments/ Ministries concerned and the designated officers who alone are ultimately responsible and accountable for the action taken or to be taken in a given case. If really the citizen concerned genuinely and honesty felt or was interested in getting an expeditious consideration or disposal of his grievance, he would and should honestly approach the real authorities concerned and would not adopt any dubious devices with the sole aim of deliberately creating a situation for delay in consideration and cry for relief on his own manipulated ground, by directing his representation to an authority which is not directly immediately concerned which such consideration."

In the present review application the review applicant has sought reconsideration of the order passed by this court. Arguments of counsel for the appellant as well as the respondent were heard and considered at the time of admission of the second appeal by this Court and by way of a comprehensive and conclusive order; the appeal was dismissed

after framing substantial question of law. All the ground taken by the review-applicant in the review application have already been considered at the time of final disposal of the second appeal.

The power of review cannot be exercised as an alternative mode of appeal or to permit the parties to provide another opportunity of hearing on merit, more so when the grounds taken by the review petitioner in the review application have already been discussed and considered on merit.

This court lacks jurisdiction to interfere with the impugned judgment and order and cannot act as a Court of appeal in the review application.

In view of the above, the review is dismissed with costs.

Rajesh Tandon, J.

Dated: December 5, 2007
*Dhyani

HIGH COURT OF UTTARAKHAND AT NAINITAL

Second Appeal No. 389 of 2001

1. Ramesh Chandra Shah s/o Bishambhar Shah
2. Sri Suresh Chandra Shah s/o Sri Bishambhar Shar
Both residents of village Amarapuri, Tehsil Dodapur, District Udham Singh Nagar

.....Defendant/Appellant

Versus

Prabhunath Prasad S/o Sri Ram Charit Ram r/o village Amarpur, Tehsil Gadarpur, District Udham Singh Nagar

..... Plaintiff/Respondent

Sir M.C. Kandpal, Sr. Advocate assisted by Sri S.S. Chaudhari for the review-applicants.
Sri S.S. Yadav, Advocate for respondent.

Dated: 25, 2007

Hon'ble Rajesh Tandon, J.

Heard Sri M.C. Kandpal, Sr. Advocate assisted by Sri S.S. Chaudhari counsel for the appellants and Sri S.S. Yadav counsel for the respondent.

Present appeal has been filed against the judgment and decree dated 19.07.2000 passed by the Additional District Judge, Udham Singh Nagar, thereby allowing the appeal and setting aside the judgment and decree dated 6.10.1999 passed by the Civil Judge (JD) Rudrapur.

Briefly stated plaintiff Prabhu Nath Prasad has instituted a suit against the defendant-appellants for permanent injunction restraining the defendants from interfering or by putting the mud on the disputed passage of the plaintiff by raising the construction. According to the plaintiff after the

family division about 20 years back half portion towards the Eastern side of plot no. 49/1 came to the share of the plaintiff while half share of the said plot towards the Western side came to the share of his brother Vijai Chandra Shah. A kachha rasta goes form plot no. 55 to plot no. 49/1 which was being used uninterruptedly since the time of his ancestors. The plaintiff alleged that on 10.4.1989 the defendants started throwing mud on that passage in order to interfere in the light of passage available to the plaintiff. According to the plaintiff if the defendants succeed in their act to close the rasta, the plaintiff would suffer irreparable loss.

The defendants have filed the written statement and denied the plaint allegations. They have submitted that the plaintiff is neither the owner of plot no. 49/1 nor he is in possession of the same. The father of the plaintiff sold his Abadi plot no. 50 on 25.21980 to Sri Balkrishan Pandey. Towards the South of this plot there was a rasta which is being used for going towards plot no. 49/1. The suit is bad for non-joinder of necessary parties.

On the pleadings of the parties the following issues were framed by the trial Court:

1. Weather the disputed way is in existence which was being interrupted by the defendants ? If so, whether the plaintiff is entitled to the relief claimed?
2. Whether the suit is barred by the provisions of Section 91 of the Code of Civil Procedure?
3. Whether the suit is bad for non-joinder of necessary party?
4. Whether the suit is undervalued and court fee paid is insufficient?

The plaintiff examined P.W.1 Prabhunath Prasad, P.W.2 Ram Singh, P.W.3 D.M. Jaiswal. The plaintiff filed six documents vide list 9-C and one document vide list 27-C.

The defendants have examined D.W.1 Ramesh Prasad, D.W.2 Seeta Ram, D.W.3 Mindar Singh, D.W.4 Sri Nath, D.W.5 Suresh Chandra Shah and have filed six papers vide list 36-C.

On the basis of the evidence adduced by the parties the trial court has held that there was no rasta in existence. The suit is not barred by the provisions under section 91 C.P.C. The suit is also not undervalued. As such on the basis of finding on issue no. 1 the suit of the plaintiff has been dismissed.

Feeling aggrieved the plaintiff has preferred an appeal before the District Judge which was registered as Civil Appeal No. 87 of 1999. The lower appellate court after considering the evidence on record has held that the plaintiff was able to prove his case for permanent injunction against the defendants and after setting aside the judgment and order dated 6.10.1999 passed by the trial Court, the appeal was allowed and the suit was decreed.

The appeal has been admitted. However, no specific substantial question of law has been framed. The following substantial questions of law have been mentioned in the memo of appeal:

A. Whether the third case as to easement of necessary made out by the appellate court to reverse the decree of the trial court being beyond the pleadings of the parties and evidence on record is vitiated as unsustainable?

B. Whether in view of the crucial admissions the prescriptive right of easement for the demanded passage does not stand matured?

C. Whether the confrontation of the witness by a document during cross-examination could be challenged on the basis that it was a secondary evidence even when the witness does not dispute it?

D. Whether the trial court had rightly drawn an adverse inference by the eloquent silence of the plaintiff as to his fathers signatures on the paper 33 Ga and the lower appellate court has erred in reversing the decree without commenting thereon?

E. Whether in view of the second commission report and map showing the alternative passage described in para 33 Ca, the oral evidence of all the four defence witnesses had stood well corroborated and the trial court had not erred in basing its findings on the testimony of those witnesses so as to merit reveral by the appellate Court?

The plaintiff has submitted that after the selling of plot no. 49/2 by the father of the plaintiff, the plaintiff has no alternative way to reach his plot no. 49/1. From the statement of D.W.5 Suresh Chandra Shah, it is proved that the plaintiff has no way towards the Northern side of his land. On the basis of evidence on record it has been held by the lower appellate court that the relationship of the plaintiff with his father Ramchij Ram and brother Srinath were not cordial.

D.W.4 Srinath has admitted in his cross examination that his relations with the plaintiff who is his real brother are not

cordial. Quarrel was taken place between them. Thus P.W.4 was the interesting witness.

The trial Court has based its finding on paper no. 33-C which is a photo copy of agreement dated 25.02.1980. Photocopy cannot be admitted in evidence as the defendants could not prove that the original document has been lost and cannot be made available now.

D.W.5 Suresh Chandra Shah has stated that plot no. 50 belongs to him while plot no. 49 belongs to the plaintiff. He has admitted that in paper no. 34-C some passage was shown while most of the passage going towards the village have not been mentioned. He states as under:

पेपर नं0 34–ग में 50 व 51 के कुछ हिस्से में गान्ध्रा की आबादी है गान्ध्रा में रास्ते बने हुए है जो रास्ते गान्ध्रा में है वह इस बन्दोवस्ती नक्प्रे में नही है।

Following statement of the witness shows that he was inimical to the plaintiff because the wife of the plaintiff has made complaint against this witness.

दि0 16.3.94 के अमर उजाला के पृष्ठ 12 में ग्राम सभा गुमचैया पौष्टिक आहार योजना प्रप्रिक्षण प्रिविर की जान्ध्रा का समाचार है उसमें 2700/रू की फर्जी भुगतान दर्प्राया बताया है । राष्टीय पौष्टिक आहार योजना की समिति अध्यक्ष मेरी बहन थी ।

From the statement of D.W.3 Sikander Singh it is evident that there was no alternative passage for the plaintiff to reach to his hand plot no. 49/1. Sri Harish Chandra Pandey has constructed his house over the land which he has purchased from the father of the plaintiff.

Sita Ram D.W.2 in cross examination has admitted that Ramchij Ram and Prabhunath Prasad were father and son and there was litigation between them.

P.W.1 Prabhunath Prasad has stated that there was Panchayat in the village regarding the alleged rasta but the defendants disobeyed the order of Panchayat.

The important witness in this case is P.W. 3 Sri D.N. Jaiswal, who was appointed by the court as Vakil Commissioner. This witness has categorically stated that he visited the spot on 13.4.1989 and prepared site plan 22-C/3 and has mentioned all particulars. He has submitted that there was not alternative passage for the plaintiff to reach his plot.

The extract of Vakil Commissioner's report paper no. 52-C is a under:

1. यह कि प्रतिवादी के द्वारा दिया गया कमिप्रन प्रार्थना पत्र पर विवादित रास्ता के0एल0ई0एम0 का मौके पर निरीक्षण किया गया और यह पाया गया कि के0एल0ई0एम0 के बीच में वर्तमान मे कोई रास्ता नहीं है क्यारियॉ बनाई गई हैं जिसमें सब्जी लगाई गयी है एल0 और ई0 के सेन्टर से एक झोपड़ी पडी हंई है जो पहले कमिप्रन के समय नही थी। 18 15 के बीच में पुराना पुराल पड़ा हुआ है तथा उसकेबाद 13 6 के बीच गोबर खिादक्र पउा हुआ है जिसको नक्प्रा नजरी में दर्प्राया गया ळै । प्रतिवादी के मकान में जाने के लिए ए0 बी0 2 गेट बने हुए हैं और उसमें कोई फाटक नही है । के0 बिन्दु से प्रभुनाथ प्रसाद के प्लाट में लगे हुये बारिंग की दुरी 20 फीट है।

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2. यह कि अतिरिक्त कमिप्रन प्रर्थना पत्र के पैरा नं0 6 के मुताबिक प्रतिवादीगण की आवादी के पप्रिम की ओर श्री हरीप्र चन्द्र की आबादी है जो सी0टी0एन0 तथ एस0 बाई0 एच0 रास्ते का अवलोकन किया गया तथा इस निष्कार्प्र पर पहॅुच गया कि एच0 आई0 एन0टी0 रास्ता धान कटने के बाद टैक्टर के जाने से बना हुआ है हरीप्रचन्द्र के खेत में धान कट जाने के बाद जडे मौजूद पाई गयी जिसको नजरी नक्प्रा में लाल इंक से दर्प्राया गया है ।

It is fully proved that the disputed passage was being used by the plaintiff for going to his land. Defendants have enmity with the plaintiff on account of the election of Gaon Pradhan and due to complaint made by the wife of the plaintiff against the sister of the defendants and in order to take revenge the

defendants have interfered the passage of the plaintiff by making the construction and by throwing the mud.

In view of above, I find that the lower appellate court was fully justified in allowing the appeal and to quash the judgment and decree passed by the trial Court. I find no illegality and irregularity in the order passed by the lower appellate Court. After considering the entire materials on record none of the question law framed in the memo of appeal are either involved or goes in favour of the defendant.

Accordingly, the second appeal lacks merit and is hereby dismissed.

Dated: 25.5.2007 **Rajesh Tandon, J.**

*Dhyani